The Obligation to Assist: Model Litigants in Administrative Appeals Tribunal Proceedings Seminar

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Decision-makers and agencies - when is enough, enough?

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Comcare employees are in the business of decision-making. Comcare employees make decisions in the process of administering the workers' compensation and rehabilitation scheme for Australian Government and Australian Capital Territory Government employees established under the *Safety, Rehabilitation and Compensation Act* 1988 (the **SRC Act**).

The decisions that Comcare makes can have a profound impact on individuals (and these individuals' families and employers). It is important (and almost goes without saying) that, when making decisions, Comcare makes those decisions lawfully; based on a sense of natural justice; based on evidence, and in an accountable way.

It is not surprising, then, that the framework in which Comcare makes decisions is set out in some detail in legislation and guidelines issued pursuant to legislation. For example, Comcare has a statutory obligation to make determinations accurately and quickly (section 69(a) of the SRC Act).

Further, section 72 of the SRC Act sets out quite clearly how Comcare should behave when determining claims: Comcare *'shall be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities; Comcare is not required to conduct a hearing, and is not bound by the rules of evidence'*.

But what of the situation where Comcare has done that, where Comcare has made a determination and an affected party applies to have the decision reviewed by the Administrative Appeals Tribunal (the **Tribunal**)? Comcare is a party to the application and still retains its status as a decision-maker - but what else is it required to do? Clearly, it is required to assist the Tribunal (and it is to that end we are here today), but what does that mean?

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Today, I intend to take a closer look at the obligations placed on Comcare by legislation, in particular, the *Administrative Appeals Tribunal Act* 1975 (the **AAT Act**) and the *Legal Services Directions* 2005, and consider, in the context of gathering evidence, what impact they have on Comcare attempting to achieve its statutory objects and attempting to meet the statutory objectives of the Tribunal itself.

Obligations placed on Comcare

By way of background, I will spend a moment explaining some basic decision-making processes that Comcare follows. Firstly, when considering claims, Comcare must determine the existence or non-existence of material facts. For example, if a claim is made pursuant to section 14 of the SRC Act, Comcare must decide whether the claimant is a Commonwealth employee; whether the claimant has suffered an injury; and whether that injury to the claimant has resulted in death, incapacity for work or impairment.

Comcare will satisfy itself of the existence of each material fact (and the relevant facts that underpin them) based on evidence supplied by the claimant or that Comcare obtains of its own accord. Comcare should be satisfied on the 'balance of probabilities' that a fact exists.

Sometimes the evidence establishes the fact without any issue. Sometimes there is conflicting evidence that needs to be weighed. Occasionally there is no evidence about a material fact at all.

Comcare is not obliged to investigate claims. That is, it is not obliged to go looking for evidence to prove the existence of a material fact. Nor, however, is the claimant. Mind you, if there is no evidence in respect of a material fact, it should come as no surprise to a claimant if Comcare makes a decision rejecting liability.

So that there can be at least a minimum level of evidence upon which to base a decision, the SRC Act requires a claimant to supply a certain level of evidence when they make a claim. Subsection 54(2) says the claimant must supply the prescribed claim form and, unless the claim is only for medical treatment or death benefits, they must also supply a prescribed medical certificate. In some cases, the information contained in the claim form and on the medical certificate is enough for Comcare to make a decision.

Occasionally, the evidence on the form is inadequate to allow Comcare to make a decision. If that is the case, Comcare has certain powers to gather information which may be used as evidence. For example, Comcare can compel a claimant to be medically assessed (section 57) and it can compel a person or agency to supply information and/or documents (sections 58 and 71). Comcare has its own internal policies that govern when these powers should be used. In respect of medical examinations, for example, Comcare's policy is that medical examinations (and the resulting reports) should only be requested if:

- the claimant does not receive treatment from a doctor with relevant qualifications;
- the treating medical opinions are inconclusive;
- further specialised opinion is reasonably required; and
- conflicts of opinion between treating doctors must be resolved.

As I said, Comcare has a statutory obligation to make determinations accurately and quickly. To that end, Comcare might not seek to investigate a claim if the information supplied by the claimant does not establish the material facts - although the principles of natural justice will sometimes oblige Comcare to inform the claimant of the type of evidence that might assist in assessing those facts.

As a decision-maker then, Comcare is bound by its own legislation, but also by the *Legal Services Directions* 2005. The *Legal Services Directions* apply to Comcare as explained in section 12.3 of the Directions. Comcare is not an FMA agency and does not handle claims or conduct litigation in the name of or on behalf of the Commonwealth. Therefore, the Directions have limited application to Comcare. Importantly, the *Model Litigant Obligations* do apply to Comcare.

In addition to its obligations under the SRC Act to make determinations accurately and quickly, pursuant to the Model Litigant Obligations, Comcare must also:

- deal with claims promptly and not cause unnecessary delay[1],
- make an early assessment of its prospects of success in legal proceedings[2],
- pay legitimate claims without litigation[3],
- act consistently in the handling of claims[4],
- avoid and limit the scope of litigation[5] and,
- if litigation cannot be avoided, keep the costs of litigation to a minimum[6].

It is paragraph 2(e) of the Model Litigant Obligations that has the most bearing on Comcare's behaviour once a claim is before the Tribunal. That is, keeping litigation costs to a minimum.

In addition to these obligations, further obligations are placed on Comcare when a claim comes for review before the Tribunal. The *Administrative Appeals Tribunal Amendment Act* 2005 introduced, among other things, a range of changes to the way in which the Tribunal deals with applications for review. A new subsection was introduced into s 33 of the AAT Act which provides:

[1] *Legal Services Directions* 2005, Appendix B The Commonwealth's Obligation to Act as a Model Litigant, para 2(a)
[2] Above, para 2(aa)
[3] Above, para 2(b)
[4] Above, para 2(c)
[5] Above, para 2(d)
[6] Above, para 2(e)

Decision-maker must assist Tribunal

(1AA) In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

This provision was included following the Australian Law Reform Commission's *Managing Justice* report[7]. In particular, Recommendation 121:

"Recommendation 121"

The federal Attorney-General should specify in the model litigant obligations, set down in legal services directions under the Judiciary Act 1903 *(Cth), that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to reach its decision.*

Bowen CJ and Dean J in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 coined the phrase we use to describe the type of decision the Tribunal should make - the 'correct or preferable' one. The conjunction 'or' is used to accommodate the difference between a matter susceptible of only one decision - in which the 'correct' decision must be made - and a decision which requires the exercise of a discretion or a selection between more than one available decision, in which case the word 'preferable' is appropriate.

Accordingly, it can be said that Comcare has a further obligation to assist the Tribunal reach its decision. In addition, it is the Tribunal's obligation to reach the 'correct or preferable' one.

It is arguable whether there is a direct obligation placed on Comcare to assist the Tribunal comply with the Tribunal's statutory objectives of providing a mechanism of review that is fair, just, economical, informal and quick[8], but the inference can be drawn from the obligation to assist the Tribunal make its decisions and, in any event, the obligations and objectives imposed on Comcare by its own legislation and the Model Litigant Obligations overlap almost completely with the Tribunal's objectives.

Evidence in the Tribunal

In respect of each decision made by Comcare that is referred to the Tribunal, Comcare will have based its decision on evidence (or a lack of evidence). By the time the Tribunal comes to review a decision of Comcare, new (including better) evidence may have come to hand. A

[7] *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89)
[8] *Administrative Appeals Tribunal Act* 1975 (Cth), Section 2A

claimant has up to 28 days before a date fixed for hearing to present new evidence to the Tribunal (and longer if granted leave).

It would be nice to be able to say that, when a matter comes before the Tribunal, Comcare will not seek any new evidence – after all, it has already made two decisions based on the evidence it had. Unfortunately, once a claimant enters the Tribunal process, they often obtain legal representation and their legal representative may take a different approach to what evidence is necessary to support their claim.

Because a claimant will most likely obtain new evidence once the Tribunal process begins, Comcare will have to consider whether to obtain further evidence itself to verify or clarify the new evidence of the claimant. Unlike the Tribunal's power to issue summonses for the production of evidence, Comcare does not have power to compel third parties, other than a claimant's employer, to produce evidence during the internal decision making process, so there may be clinical notes etc that Comcare may have difficulty obtaining (including being unable to obtain) prior to the commencement of Tribunal proceedings

When should Comcare obtain evidence in the Tribunal?

The starting point for a discussion of when Comcare should obtain further evidence in Tribunal proceedings is an understanding that, when a claimant applies to the Tribunal for a review of a decision by Comcare, Comcare will ordinarily require no further evidence if the claimant obtains no further evidence.

How does Comcare respond, then, when a claimant (let's now call them an applicant) obtains new evidence? Remember, too, that the new evidence may be obtained by an applicant because previous evidence was insufficient or inadequate to prove a particular material fact, or it may be that, by the time the applicant is in the Tribunal process, the issues themselves have changed and the material facts that are relevant might not have been considered before.

In fact, this is one of the challenges that Comcare faces – that is, that the claim Comcare determines might not be the same claim that is ultimately before the Tribunal. Madgwick J of the Federal Court made it clear in his decision of *Abrahams v Comcare*[9] that to an extent, an applicant may permissibly reformulate their claim, such that the very injury considered by the original decision-maker might be amended by the time the claim is being considered by the Tribunal. In that case, the Tribunal will need to re-assess the evidence in respect of a new or differently defined injury.

[9] [2006] FCA 1829 (6 December 2006)

If a new issue is raised before the Tribunal in respect of a claim or a new claim is formulated (within the bounds considered by *Abrahams v Comcare*), then Comcare, as a decision-maker and as a Tribunal participant, should consider any new evidence in respect of the relevant material facts and, if the new evidence is supportive of the existence of the material facts (according to Comcare), then Comcare should seek to resolve the application by consent – this is done most often by way of a section 42C[10] decision.

Clearly, if Comcare takes that course of action - to resolve the application based on new evidence - it is complying with its obligations to act as a Model Litigant and also to assist the Tribunal to make a decision.

However, in some cases, new evidence obtained by the applicant is inconclusive or Comcare, after considering the evidence, still does not think the evidence, on the balance of probabilities, supports the existence of a relevant material fact.

In fact, there may be a number of situations where the evidence purportedly is supportive of a relevant material fact but Comcare will still wish to obtain evidence in response. An example that highlights some of these issues well is the situation where an applicant, once in the Tribunal, obtains an opinion from a medical expert in relation to, say, the level of permanent impairment they have in respect of an injury.

The opinion may be sought by the applicant to cover the following material facts: the existence of an injury; whether the injury arose out of, or in the course of, the applicant's employment; whether the injury has resulted in impairment; whether the impairment is permanent; and, if so, whether the permanent impairment reaches the 10% threshold which entitles a claimant to compensation pursuant to sections 24 and 27 of the SRC Act.

Comcare might need to seek evidence in response to an opinion obtained by the applicant in respect of those material facts because:

- The history given to the expert by the applicant is inconsistent or appears to be false;
- Evidence differs as to the proper diagnosis of a condition;
- One expert offers an opinion that the nature of the applicant's injury is psychological rather than physical or vice versa, neurological rather than orthopaedic, etc;
- The expert does not have an appropriate expertise to offer opinion evidence on a relevant issue;

[10] *Administrative Appeals Tribunal Act* 1975, section 42C

- The expert opinion provided may not comply with the ratio in *Makita v Sprowles*[11], that:

  > *'so far as the [expert's] opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it.'*

- The opinion of the expert or way in which it is expressed, calls into question the expert's independence;
- The opinion does not comment on all material facts; or
- The opinion is simply inconclusive

For these reasons, among others, Comcare may decide that it would assist the Tribunal make a decision (and being conscious of the fact the Tribunal is attempting to make the correct or preferable decision) if it had additional evidence - evidence that seeks to focus on the insufficiencies identified in the evidence put before the Tribunal by the applicant.

In other cases, it won't necessarily be a case of insufficiencies in the applicant's evidence, but the fact that Comcare is asserting the existence of material facts in a so-called 'exclusionary' provision. The Tribunal (and Comcare for that matter) may only be able to make a decision in respect of the relevant material facts (for example, whether there was reasonable administrative action taken in a reasonable manner) if evidence is obtained from an applicant's employer and colleagues, for example.

It is often in the Tribunal, where the parties have access to the coercive powers of the Tribunal through the summons process, for example, that adequate evidence can be obtained. Notwithstanding that Comcare will investigate these issues as early as possible, in an effort to make quick and accurate decisions the best evidence will not always be obtained at the claims stage.

Conflict of obligations

This raises an interesting issue, an issue with very real practical implications. It seems to be the case that the obligations placed on Comcare by its own legislation, and by external legislation, such as the Legal Services Directions and the AAT Act, are not always compatible.

[11] *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305

An example of the conflict Comcare faces is in relation to the issue of surveillance footage. Take the example of a claimant who claims an injury has resulted in a particular incapacity. In order to prove the incapacity - a material fact - the claimant may have provided an expert opinion supporting the existence of the incapacity. Comcare may however, have reason to believe that the incapacity does not exist; or that facts upon which the medical expert has relied in providing an opinion are not true.

In order to assist the Tribunal reach its decision and, knowing the Tribunal has an obligation to reach the correct or preferable decision, Comcare may obtain surveillance footage of the applicant – footage which suggests the applicant has no impairment or that a history provided to the expert is not reliable.

In those circumstances, in a manner consistent with Comcare's obligations to act as a Model Litigant and to assist the Tribunal, Comcare may consider whether it is appropriate to disclose or withhold the footage until the opportunity arises to cross-examine the applicant in respect of the footage at the hearing. In some cases, it may amount to a denial of procedural fairness if Comcare is denied the opportunity to cross-examine an applicant by reference to previously undisclosed footage – that was certainly the view of the Federal Court in *Australian Postal Commission v Hayes*[12] and *Australian Postal Commission v Bessey*[13]. In other cases, early disclosure of video footage by Comcare may facilitate prompt resolution of an application.

In addition to the video footage itself, it might also be a denial of procedural fairness to deny Comcare the opportunity to withhold service of any supplementary medical reports based on the footage until the footage is shown.

Allowing Comcare (or any other respondent) the opportunity to test the applicant's evidence is certainly just and procedurally fair, although it may not result in an individual process that is quick and economical.

What is best practice?

Of course, Comcare takes the obligations imposed by the various pieces of legislation very seriously. It is in Comcare's interest to make quick and accurate decisions. It is ultimately in Comcare's interests, and in the interests of the entire workers compensation scheme, for the Tribunal to carry out its objectives in a just and economical way.

Comcare continues to look for ways to improve its processes. To that end, Comcare seeks witness statements, clinical notes and medical reports, if necessary, at the earliest opportunity

[12] (1989) 23 FCR 320
[13] [2001] FCA 266

in an application. Comcare also takes seriously the Statement of Issues, which are to be filed at the first conference and sees these as an important opportunity for the parties to narrow the issues and therefore the facts in issue and to make a best assessment of whether any further evidence is required and to constantly ask, why? Why do we need this evidence?

Comcare also works in partnership with stakeholders in the compensation jurisdiction. To that end, Comcare convenes a Commonwealth Compensation Liaison Committee. The Committee comprises representatives of the Department of Veteran's Affairs, the ACTU, SRC Act licensees, representatives of Australian Lawyers Alliance, a national plaintiff law firm and the legal firms that represent Comcare in Tribunal proceedings.

The Committee in particular has focused attention on the extent to which parties to applications before the Tribunal can contribute to reducing the duration of matters, in particular, the process for the collection and exchange of evidence, relating to the:

- production of summons material;
- arrangement of medical appointments; and
- amending the template Statement of Issues to identify jurisdiction of the Tribunal and issues within the scope of the dispute.

Comcare seeks to limit the circumstances in which it will require new evidence and seeks to avoid a 'serial' approach to gathering evidence. Rather, it makes an assessment on an application by application basis, considering the Model Litigant Obligations, the AAT Act and the overriding purpose of achieving outcomes that are consistent with the scope, purpose and object of the *Safety, Rehabilitation and Compensation Act* 1988.

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